IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JERONICA L. MENEFEE,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION No.:**
v.	)	**2:18-cv-01208-CLM**
	)	
ACTION RESOURCES, LLC.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S REPLY
TO PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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DEFENDANT'S SUPPLEMENTAL UNDISPUTED OF FACTS

1. Chronic migraine is defined as having at least 15 headache da month, with at least 8 days of having headaches with migraine features, for than 3 months. Doc. 38-1, p. 26.

2. Ms. Menefee only mentioned having a migraine headache one This was on August 22, 2017, when she asked to leave work 1.5 hours early, st that noise caused by construction in the office and people trying to talk over i giving her a migraine. Doc. 38-1, p. 31¶ 4.

3. Before she was hired by Action, during her interview, Ms. Me herself mentioned the gap in her employment history, volunteered that she ha an illness. When asked if the illness had resolved, Ms. Menefee said it had. Sh not mention headaches, a disability, or any medical condition. Doc. 38-1, p.32

4. Action was aware that Ms. Menefee had a runny nose during the s of 2017, but attributed it to allergies. Doc. 38-1, p. 32 ¶8.

5. Shortly before her surgery, Ms. Menefee told Brandy Cupp she CSF leak, which was fluid leaking from her nose. She said "they" did not know caused it. Ms. Menefee never said there was a connection between the leak migraines or that she was experiencing migraines. She only said she had

of common knowledge that she had migraines, this was not the case. Brandy C
is the only person she told she had a migraine, and this happened the one day
she asked to leave work early while the work area was undergoing work
construction, and the noise was giving her a headache. Doc. 38-1, p. 32 ¶ 10.

7. Other than one occasion when she left work early, Action has no re
of Menefee leaving work because of a headache. Doc. 38-1, p. 33 ¶ 12.

8. Brandy Cupp does not ask employees personal questions about
lives, but information is volunteered. Ms. Menefee did talk to Ms. Cupp abou
past history of unemployment, but she did not attribute her unemployme
migraines or say it was caused by migraines. Ms. Menefee did not state to Cupp
she was currently having migraines. Doc. 38-1, p. 33 ¶ 13.

9. Other than the one time Ms. Menefee asked to leave work earl
August 22, 2017, the only past migraines that may have been discussed was
Ms. Menefee was about to go out for surgery. She did not say she was curr
having migraines at that time. Doc. 38-1, p. 33 ¶14.

10. During the Thanksgiving and Christmas holiday seasons, mid to
November and in December, an employee in Ms. Menefee's position cannot
4-6 hours per day. Long days and demanding schedules are required durin
holiday season. Doc. 38-1, p. 33 ¶ 15.

has no knowledge of the requires hours, demanding schedule and work durin holiday season. Doc. 38-1, p. 33 ¶ 15.

12. All Settlement Department team members are required to use a indicating whether they were on break, so if team members are on their cell ph they were using their personal time. The sign applied to everybody while Me was working for Action, and it continues to apply to all employees in the Settle Department. Doc. 38-1, p. 34 ¶ 16.

13. The Billing Department used them as well. Doc. 38-1, p. 34 ¶ 17

14. When Ms. Menefee was released to return to work on Novembe 2017, she had been released by her doctor, had recovered from surgery, and h restrictions. Menefee texted Brandy Cupp to state she had headaches and b vision while she was recuperating from her surgery, but Cupp's understanding that by November 20, 2017, she was healthy and had been released to return to without restrictions. Doc. 38-1, p. 34 ¶ 19.

15. Action has no record or knowledge of any communication Menefee requesting a disability accommodation. Doc. 38-1, p. 34 ¶ 20.

16. Menefee was not given permission to be absent from wor November 20, 2017. She did not ask for permission to be absent, for an extensi

17. Steve Royce and Brandy Cupp testified under oath that they would taken her Menefee back if she had reapplied in thirty days, with the same pos pay, title, and benefits. Doc. 25-20, 176:5; 189: 15-22; Doc. 25-16, 73:5-7; 13-

ARGUMENT

I. Menefee did not disclose a disability of chronic migraines to Action.

Under Action's disability accommodation policy, it is the emplo responsibility to notify the company of any disability for which the empl requires accommodation by notifying Human Resources. Doc. 25-15, p Menefee did not disclose any information about migraines to Steve Royce decisionmaker who administratively terminated her for failure to return to v Doc. 25-20, 174:20-23. As Royce testified:

> Q. Did she say anything to you about having migraines?
> A. No, ma'am.

Id. Royce also testified that there was nothing in her return to work certific indicating that she had migraines (Doc. 25-20, 181:7-10), that she did not tell h anyone else at Action that she had a disability (Doc. 25-26, p. 7, ¶ 22) and her s term disability statement also said nothing about migraines:

> Q. Under 16(a), how does Ms. Menefee describe her sickness?
> A. CSF Leak

> Q. Is there anything indicating that the procedure that she was going to undergo was related to migraines?
> A. No, ma'am.

Id., 184:16-185:5. Human Resources employee Kara Kyle also testified Menefee said nothing to her about migraines:

> Q. Did she ever say anything to you about having migraines?
> A. I do not recall anything about migraines.
> Q. Did she ever say anything to you about having a disability?
> A. No.
> Q. Did she ever come to you and ask for a workplace disability accommodation.
> A. No.

Doc. 25-18, 83:16-84:2. At her deposition, testifying under oath (unlike declaration), Menefee herself was unable to identify any notice that she pro concerning migraines. In her deposition (Doc. 25-1), she testified:

> Q. Having gone through all the emails, this is the only mention I can fin a migraine. Do you recall any other messages that you sent to Brandy C about a migraine?
> A. I don't recall.
> Q. Do you recall any messages you sent to anyone who worked at Actio about a migraine?
> A. I don't recall.
> Q. Did you ever contact HR about having a migraine?
> A. I don't recall.
>
> Q. Did you ever request any kind of a workplace accommodation from

Id., 189:22-190:14. She further testified:

> Q. Did you contact the human resource department with any request for accommodation while you were working for Action?
> A. I don't recall ever doing so.

Id., 42:1-4.

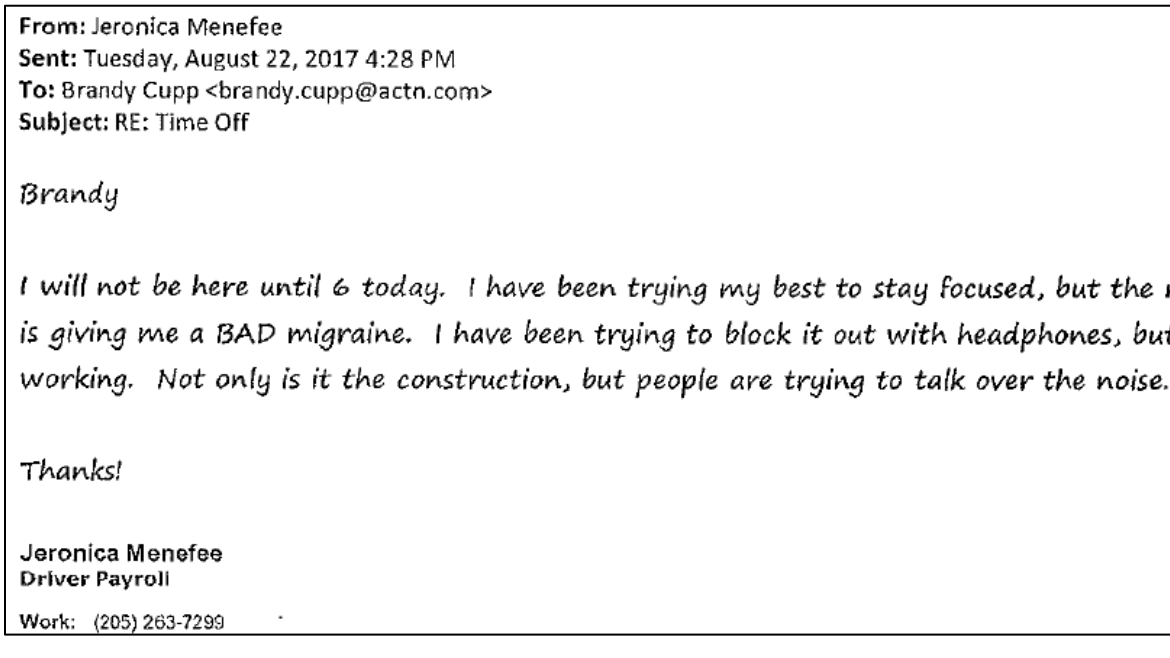
Menefee repeatedly answered, "I don't recall" when asked whethe contacted, notified or sent messages to anyone at Action saying that she was h chronic migraines. Plaintiff cannot carry her burden of establishing that she pro notice of a disability to her employer by stating under oath that she does not providing notice. The nonmoving party must come up with evidence that negate version of events alleged by the moving party—an acknowledgment that the may have occurred, but if the witness cannot remember, falls short. *Wayne C v. AT&T, Inc*., No. 2:18-cv-1639-ACA, 2019 WL 2268977, at * 3 (N.D. Ala. 28, 2019) (quoting *Chandler v. James*, 985 F. Supp. 1094, 1100 (M.D. Ala. 19 Menefee also answered "I don't recall" when asked why she was denied disa benefits. Doc. 25- 2, 35:21-36:14. She testified:

> Q: Have you ever applied for disability benefits?
> A: Yes ma'am.
> * * *
> Q. What was the outcome -- first of all, what was the disability?
> A. Migraines.
> * * *

Here, the moving party (Action) strongly asserts that Menefee never disc chronic migraines as a disability. Despite her carefully worded declaration, Me does not actually state that she notified anyone at Action that she was disabled d her employment or at the time of her separation. *See generally,* Doc. 31-2. Be Menefee did not self-identify as disabled or tell anyone at Action that she experiencing chronic migraine headaches, the question is whether, anecdotally sprinkled enough bread crumbs to constitute notice to her employer she was dis due to chronic migraines. If not, Action had no notice of a disability of ch migraines and no obligation to accommodate it because the obligatio accommodate only extends to known disabilities. *Batson v. Salvation Army* F.3d 1320 (11th Cir. 2018) (the ADA requires an employer to accommoda employee with a known disability unless an accommodation would result in u hardship to the employer).

Chronic migraines are defined as 15 or more migraine headache day month for a period of at least three months. Doc. 38-1, p. 26. While employe Action from February 2017 through October 2017, if she was a chronic mig sufferer, plaintiff would have experienced a minimum of 15 migraines per mon at least three months or 45 migraine headaches. *See* Id. During her eight-m Action career, she would have experienced between 90 and 135 chronic migra

for Action. Doc. 25-15, p. 27. On August 22, 2017, she sent the following em her supervisor, Brandy Cupp:



From: Jeronica Menefee
Sent: Tuesday, August 22, 2017 4:28 PM
To: Brandy Cupp <brandy.cupp@actn.com>
Subject: RE: Time Off

Brandy

I will not be here until 6 today. I have been trying my best to stay focused, but the
is giving me a BAD migraine. I have been trying to block it out with headphones, bu
working. Not only is it the construction, but people are trying to talk over the noise.

Thanks!

Jeronica Menefee
Driver Payroll

Work: (205) 263-7299

Id. As testified to by Cupp, Menefee telling her she had a migraine was not a re for a disability accommodation. Doc. 25-16, 76:21-77:2. Cupp stated:

> Q. By telling you that she had a migraine, was Ms. Menefee, under that p requesting a disability accommodation?
> A. No

Id. Action submits that no reasonable jury could find that this email provided n of a disability, especially since Menefee very specifically wrote that the mig was caused by construction noise. *Id*. Further, Royce was not aware of the (Doc. 25-16, 21:20-22), and according to Cupp, this was the only email Me

> Q. So you were asked about her having migraines, plural.
> A. Yes
> Q. To your knowledge, did you ever get -- did you ever get any inform
> from her that she had anything other than this single migraine at work?
> A. No.

Id. In addition, there is no assertion by Menefee that Steve Royce knew that sh
work early one time because construction noise was giving her a headache.

Menefee's second mention of the word "migraine" occurred on October
2017, in a text to the corporation's controller while she was on personal leave
her nasal surgery (Doc. 31-2, p. 29). She wrote:

> All I can do is pray for the best. It took me years to get back into the work force from being sick with migraines. I disliked the job before Action, but I'm finally with a company I enjoy.

Doc. 31-2, p. 29. The text said nothing about the nasal surgery causing migra
See Id. It said nothing about currently experiencing chronic migraines or
disabled. *See Id*. Plaintiff states in her declaration that she "notified" corpor
controller John Rohwedder that she "was worried because of [her] histo
migraines and to please not replace [her]." Doc. 31-2, p. 4, ¶ 21. The text doe
say "I am having migraines," "please do not replace me because of my migra
or mention currently having migraines. *See* Doc. 31-2, p. 29.

More importantly, Menefee does not assert, and there is no proof in the r

According to Menefee's declaration, she sent the text to Rohwedder (Doc. 31 21). She does not allege that it was received by Royce. *See generally*, Doc. (failing to allege that Steve Royce received plaintiff's text message to Rohwed Rohwedder did not work in HR (Doc. 38-1, p. 31 ¶ 3.) As such, there is no fa basis to conclude that Rohwedder shared the text with the Royce.

The third and final reference to migraines is a note from a nurse at Mene ear nose and throat doctor's office listing temporary restrictions from the car w

Return to Work/School Status
Work Status : Return to work, with restrictions
Restricted Work/School Stop Date : 12/20/2017

Work Restriction Grid

Restrictions :	light actvity: -restricted work hours such as 4-6 hours a day -restricted computer usage due to uncontrolled migraine headaches and intermittent blurry vision -allow for frequent bathroom breaks due to taking a required medication containing diuretic
	Bailey, Jessica L

Doc. 25-15, p. 43. This note indicated that Menefee could return to immediately, but required temporary light-duty. *Id*. (making no reference to pla being unable to work or needing any days off). The temporary nature o restrictions is underscored by the designation of an end date: December 20, *Id*. This was not notice of a disability.

With respect to information that was available to Royce when he mad decision to terminate Menefee, this was ***Piece of Information #1. Piec Information #2*** available to Royce when he made the termination decision note Menefee provided from the UAB emergency room stating that she shou off from work on November 21 and 22, 2017. Doc. 25-15, p. 44. It read:

> Return to Work/School Status
> 11/20/17 02:07 pm performed by Walden, Cindy
> Entered on 11/20/17 02:07 PM
>
> Return To Work/School Status
> Employer/School: Action Resources
> Return to Work/School start date: 11/23/17
>
> Return to Work/School Comment: patient was seen in the UAB Highland ER on 11/20/17. Patient may return to work on 11/23/2017.

Doc. 25-15, p. 44. Thus, according to ***Piece of Information #2,*** Menefee could r

(according to the ER) and 29 days (according to the ear nose and throat doctor no notice of a medical condition or impairment lasting longer than 29 days. 25-15, p. 44; Doc. 25-15, p.43.

Action notes parenthetically that in her declaration, Menefee states that she left the ER, she was "released on a migraine protocol." Doc. 31-2, p. 4, As shown by the doctor's note, there is no mention of migraines or a "mig protocol." Doc. 25-15, p. 44. Menefee's declaration does not assert that a mig protocol or the records attached to her declaration titled "Medical Visits Sum 11/20/2017," (Doc. 31-2, pp. 30-44) were provided to Action before her separa *See* Doc. 31-2, ¶ 23. Based on her failure to state that these records were pro to Action prior to her separation, there is no basis for the Court to assume that were or to attribute knowledge of the records' content to Steve Royce.

When Menefee was terminated, Action had no records or notice permanent disability, including chronic migraine headaches. Menefee was n individual with a known disability, and absent knowledge of a disability on the of Steve Royce, she cannot have been separated on the basis of disability, and A is therefore entitled to summary judgment in its favor and dismissal of this cla

II. Plaintiff did not request a disability accommodation.

> if an associate brings up a request for accommodation, that you review that and see if it's something that your company can do without causing unreasonable hardship on that company. So there's a process that the employee would have to go through, to make the employer aware. The employer would go through the appropriate steps and evaluate and make that determination."

Doc. 25-14, 18:9-19:7 (emphasis added). Coley testified that Human Resource not engage in this process with Menefee because there was no request fo accommodation. Doc. 25-14, 21:21-22:10. In Ms. Coley's words, "it never up." *Id*. When asked about notice, Coley testified, ". . . it is the responsibility fo associate to make the leader or the organization aware of what their need is in for them to be able to evaluate or even accommodate it." Doc. 25-14, 19:23-2 She further testified that it is the responsibility of the employee to notify hu resources that they require an accommodation:

> Q. What would an employee have to do to make an employer aware?
> A. It would depend on what that organization has set up. **But, typically it is to reach out to their HR department to let them know that they have a situation that requires an accommodation and they have to make them aware of what the accommodation is.** Usually, typically, there's some forms that they have to fill out, either them directly or provide to their healthcare provider, which is in turn provided to the organization, allows them to review that data and make a determination moving forward.

Doc. 25-14, 19:8-22. According to the three Action Human Resources Depart

¶¶ 26-27; Doc. 25-14, 21:21-22:10; Doc. 25-18, 83:16-84:2; Doc. 25-20, 17

23. Although the decisionmaker, Steve Royce, was aware that plaintiff undergoing surgery for what he understood to be sinus problems, she mad mention of migraines, and requested no accommodation related to the surger testified to by Mr. Royce:

> Q. Is there anything indicating that the procedure that she was going to undergo was related to migraines?
> A. No, ma'am
>
> * * *
>
> To the best of your recollection, did she ask for any accommodation for sinus problems?
> A. No she did not ask for any accommodation for sinus problems.
> Q. Or for the CSF leak, as she identifies in this document?[1]
> A. No, she did not.

[Record cite?] It is uncontroverted that Menefee was released to work on Nove 20 with no restrictions (Doc. 38-1, p. 34 ¶ 19), and as she states, was "able to r to work on November 20, 2017." Doc. 25-8, p.2. In her communications wit EEOC, Menefee stated that on November 20, 2017, the following occurred:

> I was able to return to work on November 20, 2017. On November 20, 2017, I was involved in an automobile accident which required medical treatment at the Emergency Room. The physician gave me a return to work accused for Friday, November 24, 2017. I phoned management and sent my doctor's excuse to Human Resources Associate (Kara Kyle) via

> termination letter via email from Human Resources Associate Kara Kyle. I spoke with Maria Coley, Human Resources, who told me that the termination letter was sent because I did not report back to work. I told Ms. Coley that I sent my physician's excuse to Ms. Kyle.

Doc. 25-8, p. 2. Menefee provided this statement to the EEOC on April 6, 2 Notably absent is any claim that she was disabled, had chronic migraine requested that her employer provide a disability accommodation. In fact, Me denied being disabled. Doc. 25-8, p. 2. According to Michael Albert's notes (25-8, p. 4), during her interview, Menefee did not say that she told anyone at A that she was disabled, or ask for a disability accommodation. *See Id*. Th consistent with the deposition testimony that Menefee emailed informatio Human Resources employee Kara Kyle on the day of her car wreck, but did no she was disabled or ask Kyle for a disability accommodation. Doc. 25-18, 65:1 83:20-84:2.

Therefore, the Court is confronted with three questions: first, wh Menefee can create an issue of fact on summary judgment by contesting her pre sworn testimony in which she had no recollection of requesting an accommoda second, whether temporary work restrictions constitute a disability; and whether alone, the two doctor's notes emailed to Action constituted "a reque accommodations in the form of continued employment, holding [her] jo

temporary relief, and a temporary reduced schedule" on the basis of a disa under the ADA. *See* Doc. 31-2, p. 6, ¶ 33.

A. A party cannot create a material issue of fact by contradi previous sworn testimony.

As stated in *Israel v. Sonic-Montgomery FLM, Inc.*, 231 F. Supp. 2d (M.D. Ala. 2002), *Tippens v. Celotex Corp.*, 805 F.2d 949 (11th Cir.1986), and *T. Junkins & Assoc., Inc. v. U.S. Indus.*, 736 F.2d 656, 658-59 (11th Cir.1984 affidavit that contradicts prior sworn statements with no explanation cannot be to create an issue of material fact in summary judgment proceedings. *Israel* at In *Van T. Junkins*, the Eleventh Circuit affirmed a grant of summary judgm holding that a district court may properly find that a party's contradictory affi to be a sham. *Israel*, 1163-1164. The Court explained, "When a party has given answers to unambiguous questions which negate the existence of any genuine of material fact, that party cannot thereafter create such an issue with an affi that merely contradicts, without explanation, previously given clear testimony. F.2d at 657. The *Tippens* court then went on to narrow the *Van T. Junkins* rulin stated that "an affidavit may only be disregarded as a sham `when a party has g clear answers to unambiguous questions' ... and that party attempts `thereaft

create such an issue with an affidavit.'" *Israel* at 1166; *Tippens* at 954. On Ja

8, 2020,[2] during her deposition, Menefee testified as follows:

> Q. Did you ever request any kind of a workplace accommodation from hu
> resources because of a migraine?
> A. I don't recall.[3]
>
> * * *
>
> Q. Did you contact the human resource department with any reques
> accommodation while you were working for Action?
> A. I don't recall ever doing so.[4]

Menefee plainly stated in response to unambiguous questions that she did not

requesting a disability accommodation. Doc. 25-1, 42:1-4; 189:22-190:14. A

accepted and relied upon this response, and did not conduct further discovery o

point. Several months later, in response to Action's motion for summary judgm

with no explanation, Menefee very specifically states that she requ

accommodations in the form of continued employment, holding her job open

temporary period of leave, and a temporarily reduced work schedule. Doc. 31

6, ¶ 33. Action submits that this is a sham and should be disregarded.

B. Temporary work restrictions are not a disability under the ADA

Menefee provided two treatment notes to Action after her car wreck. Doc

15, p. 44; Doc. 25-15, p.43. Both stated that she was temporarily unable to work *Id*. A temporary inability to work is not a permanent or long-term impairmen does not constitute evidence of a disability. *See Sutton v. Lader*, 185 F.3d 1203, (11th Cir.1999); *Johnston v. Henderson*, 144 F. Supp. 2d 1341 (S.D. Fla. 2 *Richardson v. Koch Foods of Alabama*, LLC, No. 2:16-CV-00828-SRW, 2019 1434662, at *6 (M.D. Ala. Mar. 29, 2019), appeal dismissed, No. 19-11627 2019 WL 5571182 (11th Cir. Aug. 14, 2019) (a six-week period out of followed by a return to full-duty without restrictions did not constitute a disabi

Multiple cases cited by the Eleventh Circuit in *Sutton* underscore this p *Huff v. UARCO, Inc.*, 122 F.3d 374 (7th Cir.1997) (temporary condition disability under the Act); *Sanders v. Arneson Products, Inc.* 91 F.3d 1351, 1354 Cir.1996) (plaintiff's four-month temporary impairment was too brief to "disability"); *Gutridge v. Clure*, 153 F.3d 898, 901-02 (8th Cir.1998) (A temp inability to work while recuperating is not such a permanent or long impairment and does not constitute evidence of a disability covered by the Act

C. Emailing contradictory doctor's notes to an employer does constitute a request for a disability-based accommodation.

The employee has the burden of identifying an accommodation demonstrating that it is reasonable. *Frazier-White v. Gee*, 818 F. 3d 1249, 1155-

constituted a request for reasonable accommodation of continued leave of abs

and limited duty, was emailing two notes on the day of the wreck reading as fol

Return to Work/School Status
11/20/17 02:07 pm performed by Walden, Cindy
Entered on 11/20/17 02:07 PM

Return To Work/School Status
Employer/School: Action Resources
Return to Work/School start date: 11/23/17

Return to Work/School Comment: patient was seen in the UAB Highland ER on 11/20/17. Patient may return to work on 11/23/2017.

Doc. 25-15, p. 44.

Return to Work/School Status
Work Status : Return to work, with restrictions
Restricted Work/School Stop Date : 12/20/2017

Work Restriction Grid

Restrictions :	light actvity: -restricted work hours such as 4-6 hours a day -restricted computer usage due to uncontrolled migraine headaches and intermittent blurry vision -allow for frequent bathroom breaks due to taking a required medication containing diuretic

Doc. 25-15, p.43.

Despite exhaustive research, Action has identified no authority fo proposition that treatment notes constitute a request for a disability accommod under the Americans with Disabilities Act. One note stated that Menefee req two days off, while the other did not. One stated that she required light duty, the other did not. One put restrictions in place for two days, while the other put in place for 29 days. Each said her restrictions were temporary, but their descrip varied broadly in timing and scope. Given that the notes' coincided with Mene car wreck, and taking into account the contradictory yet temporary nature of restrictions, Action submits that no employer would interpret them as request disability-based workplace accommodation. Any employer in Action's pos would have seen them as being exactly what they were: return to work following a car wreck. Not a disability notification, not a request for a work accommodation under the ADA, just return to work notes following a car w Menefee notified Action that she had been in a car wreck and then emailed tw wreck-related notes with conflicting return to work dates and restrictions.

Action has no record knowledge of a request by Menefee for a disa accommodation. Doc. 38-1, ¶ 20 She did not request an extension of her appr leave or permission to work partial days. Doc 38-1, *Id.* She did not request a pr

submits that absent Menefee's presentation of evidence – a letter, e conversation, form, or text – from Menefee *specifying a disability-l accommodation*, Action is entitled to judgment in its favor and dismissal o claim. Fed. R. Civ. P. 56.

Finally, Menefee argues that Action may have regarded her as disabled if she did not have a disability. Under Rule 8(a), she was required to provide n of her claims against Action in her lawsuit. Her lawsuit does not include a based on "perceived" or "regarded as" disability. Doc. 18. Therefore, Me cannot pursue a claim of being perceived or regarded as disabled. Fed. R. Civ.

III. Plaintiff has failed to rebut, based on firsthand knowledge, Action's proof of undue hardship.

Menefee argues that Action could have allowed her to work part-time d the Thanksgiving and Christmas holiday seasons without undue hardship. Acco to the Action policy (Doc. 25-15), "The standard workweek period is 40 hours p. 21. The policy also states, "During busy periods, associates may be requir work extended hours." *Id*., p. 22. In Doc. 25-26, Steve Royce describes in detai allowing Menefee to work light-duty/part-time would have created an u hardship. *Id*., p. 5, ¶¶ 13-14, 19, 6-7. Menefee's response is that the holidays ar that busy for the Driver Settlement team. Doc. 31-2, p. 3, ¶¶ 13-14.

1 ¶ 15. Long days and demanding schedules are required. Doc. 38-1, Thanksgiving weeks are "hell weeks," and the weeks after are also hell. Doc. 2 143:17-19. The week after Thanksgiving is critical because they have to appro holiday pay. Doc. 25-20, 144:1-4. During the Thanksgiving and Christmas ho seasons, mid-to-late November and December, an employee in Menefee's pos cannot work 4-6 hours per day. Doc. 38-1 ¶ 15. On summary judgment, the moving party cannot create a genuine issue of material fact through speculatio conjecture. *See Bryant v. U.S. Steel Corp*., 428 Fed.Appx. 895, 897 (11th Cir. 2 Menefee's lack of personal knowledge prevents her from being able to contr Action's proof that a long her to work full time would have created undue hard

Menefee also argues that she should have been allowed to work remo Neither her deposition nor her declaration states that she asked to work remo *See generally*, Docs. 31-2 and 25-2 (showing that Menefee does not allege tha asked to work remotely). Steve Royce confirmed that Menefee never asked to remotely or from home. Doc. 25-26, p. 5, ¶ 15 There is no issue of fact on this p

IV. Menefee fails to establish race discrimination under 42 U.S.C. § 198

Plaintiff's Title VII race discrimination claim is due to be dismissed bec it was not included in her EEOC charge (Doc 25-12, p.11) or reasonably exp

claim does not require administrative exhaustion, but it is due to be dism
because she failed to present sufficient proof to establish that she was termi
because of her race. As part of her race claim, she alleges that her Cauc
supervisor, Brandy Cupp, "work remotely from a company laptop." Doc. 31-2,
¶ 28. Menefee never asked to work remotely. Doc. 25-26, p. 5, ¶ 15. She state
she felt "singled out" by a sign team members were required to display when
break or at lunch. Doc. 31-2, p. 4, ¶ 16. She does not allege that the sign only ap
to her, and her description of Cupp "making us [put] up a sign when we we
break or lunch," makes it clear that the sign applied to the whole team. *See Id*.

It is uncontroverted that all settlement department employees, regardle
race, were required to use a sign indicating whether they were on break. Doc.
p.34 ¶ 16. This was not race discrimination.

Plaintiff argues that she was not replaced by a black female, de
submitting a declaration from her replacement, a black female named Jackie
(Doc. 31-3, pp. 1-9), who was a temp-to-perm employee. Doc. 25-20, 17
176:21; Doc. 25-16, 81:3-5. According to her declaration, Nails worked for a
agency, was interviewed by Brandy Cupp in November 2017, and began wo
for Action as a Driver Settlement Coordinator in December 2017. Doc. 31-1, p
2-3, 5. Clearly, she was Menefee's replacement. Based on an email to Nails fr

her because she had a temp position that was scheduled to last six weeks. A
previously stated that Nails was a temp-to-perm employee, and that if Menefe
returned during the 30-day window, Nails would been gone back to the agency.
25-20, 175:22-177:5; Doc. 25-16, 81:3-5. For Menefee to be able to return,
had be hired in a temporary position. This does not change the fact that sh
black female who replaced Menefee as Driver Settlement Coordinator. Doc. 3
3; Doc. 25-20, 175:22-176:21; Doc. 25-16, 81:3-5.

Menefee also states that she "discovered through litigation" that Actio
allowed "other employees" to take leave without PTO or FMLA for 12 weeks
that at least one of these other employees is Caucasian. Doc. 31-2, p. 5, ¶ 26.
does not allege or provide any facts establishing that she and this employee
similarly situated. Establishing that a putative comparator is similarly situated
third prong of a plaintiff's prima facie case. *Trask v. Sec., Department of Vet*
Affairs, 822 F.3d 1179, 1192 (11th Cir. 2016). A plaintiff and the employee iden
as a comparator must be similarly situated in all relevant respects. *Wilson v*
Aerospace, Inc., 376 F.3d 1079, 1091 (11th Cir. 2004). The comparator mu
"nearly identical" to the plaintiff to prevent courts from second-guessi
reasonable decision by the employer. *Id*. Menefee offers no facts demonstratin
she and the Caucasian employee she alleges was treated more favorably were "n

Finally, Menefee alleges that she "became aware during litigation" that A transferred a Caucasian employee to driver payroll in January 2018. Doc. 31-2, ¶ 29. Assuming that this is true, the Caucasian employee replaced Jackie Nails Doc. 31-3, p. 1, ¶ 2), not Menefee.

IV. Action invited Plaintiff to return to work, and Plaintiff declined.

On November 21, 2017, Menefee was given written notice that she return if she reapplied within 30 days. Doc. 25-12, p. 2. She was eligible reinstated with the same status, same position, same pay, same title, same te same benefits and 401(k) vesting — "it would be like she never left." Doc. 2 189:15-190:7. Steve Royce and Brandy Cupp testified that they would have Menefee back if she had reapplied in thirty days. Doc. 25-20, 176:5; 189: 1 Doc. 25-16, 73:5-7; 13-18. Cupp in particular wanted her to come back According to Menefee's testimony under oath and documentation from her me treatment providers, her temporary restrictions ended before the end of the th day period. Doc. 25-16, 73:3-7; Doc. 25-20, 175:22-177:5. As such, she fail mitigate her damages by failing to return within thirty days. Doc. 25-1, 164:2-

CONCLUSION

Based upon the foregoing, Action submits that summary judgment in its

Respectfully submitted,

s/ Lisa Karen Atkins

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CERTIFICATE OF SERVICE

I hereby certify on this the 1st day of June, 2020, I electronically file foregoing pleading using the CM/ECF system which will automatically notification of such filing to the following:

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